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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Section 2 of the Sherman Act makes it unlawful to "monopolize," or attempt "to monopolize," or combine or conspire "to monopolize" any part of interstate trade or commerce. The court of appeals affirmed the dismissal of claims of actual and attempted monopolization under § 2 because the evidence was insufficient to establish a relevant geographic market. However, the court of appeals reversed the trial court and found a conspiracy to monopolize, holding that proof of relevant market was not an essential element of a § 2 conspiracy claim. The Eighth Circuit also automatically held that the same conspiracy violated § 1 of the Act despite plaintiff 's failure to prove a relevant market. The questions are:

1. Whether proof of a relevant geographic market is an essential element of a conspiracy to monopolize claim under § 2, as it is for the violations of actual and attempted monopolization under that same provision of the Sherman Act; and whether a § 1 "rule of reason" violation automatically follows a § 2 violation without such relevant market proof.

2. Whether the court of appeals emasculated the Capper-Volstead Act and *Noerr-Pennington* antitrust exemptions, and their underlying constitutional and legislative policies, by relying solely upon exempt joint conduct to infer the existence of an unlawful conspiracy.

3. Whether the court of appeals usurped the fact-finding function of the trial court, in derogation of Rule 52(a), by weighing conflicting testimony, determining the credibility of witnesses and drawing adverse inferences of conspiracy and predatory intent.

The following questions are also raised by this petition. However, petitioner relies on the arguments advanced in

support of these questions by petitioners Mid-America Dairymen, Inc. and Central Milk Producers Cooperative. The questions are:

4. Whether a not-for-profit membership organization, whose purpose is to collectively bargain on a non-pecuniary basis for its members' farm products, has standing to recover lost membership dues and fees, as antitrust injury, under § 4 of the Clayton Act.

5. Whether the Eighth Circuit erred in refusing to apply the membership rule of *National Broiler Ass'n* v. *United States* retroactively to the period involved in this case despite its conclusions: (1) that NFO had engaged in a *per se* price-fixing arrangement in violation of § 1 of the Sherman Act; and (2) that application of the *National Broiler* rule would eliminate NFO's Capper-Volstead Act exemption.

6. Whether an award of attorney's fees, pursuant to § 4 of the Clayton Act, should be apportioned to reflect accurately the extent to which a party has prevailed on the merits.

7. Whether § 4 of the Clayton Act precludes the recovery of expenses of litigation not specifically identified as costs under F.R.C.P. 54(d) and 28 U.S.C. § 1920.

THE PARTIES*

The parties to the proceeding below not included in the caption were the following defendant-appellees: Mid-America Dairymen, Inc., a dairy cooperative; Central Milk Producers Cooperative, a cooperative whose members are dairy cooperatives located in Wisconsin and Illinois; and Associated Reserve Standby Pool Cooperative, a cooperative whose members are dairy cooperatives.

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* Petitioner, Associated Milk Producers, Inc., has no parent, subsidiary or affiliated companies within the meaning of Rule 28.1.

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No. ____

ASSOCIATED MILK PRODUCERS, INC.,
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NATIONAL FARMERS' ORGANIZATION, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Associated Milk Producers, Inc. ("AMPI") prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review that court's judgments entered in this matter on August 31, 1982.

OPINIONS BELOW

The opinion of the court of appeals, reported at 687 F.2d 1173, appears in the Appendix to the Petition for Writ of Certiorari filed by the National Farmers' Organization, Inc. in Docket No. 82-1324, Appendix ("A.") at 1a. The opinion of the United States District Court for the Western District of Missouri, reported at 510 F. Supp. 381, appears in A. 67a.

JURISDICTION

The judgments of the court of appeals were entered on August 31, 1982. A petition for rehearing and a suggestion for rehearing *en banc* were denied on November 10, 1982. On February 25, 1983, petitioner was granted an extension of time to and including March 25, 1983 in which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

3. Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, provides in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and

such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .

4. Section 6 of the Clayton Antitrust Act, 15 U.S.C. § 17, provides in pertinent part:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

STATEMENT OF THE CASE

A. Background

This case began when Mid-America Dairymen, Inc. ("Mid-Am") filed an action against the National Farmers' Organization, Inc. ("NFO"), Beatrice Foods Company ("Beatrice") and certain individuals, alleging claims under § 1 of the Sherman Act and § 2(c) of the Robinson-Patman Act, and state law claims of interference with the marketing agreements between Mid-America and its dairy farmer members. NFO counterclaimed, alleging that Mid-Am, and also petitioner AMPI, Central Milk Producers Cooperative ("CMPC"), Associated Reserve Standby Pool Cooperative ("ARSPC") and Beatrice, conspired to unreasonably restrain trade in violation of § 1 of the Sherman Act; and monopolized, attempted to monopolize and conspired to monopolize trade in violation of § 2 of that Act. Beatrice was dismissed as a defendant in the actions brought by Mid-Am and NFO, respectively, in 1976 and 1977.

AMPI is an agricultural marketing cooperative, qualified under the Capper-Volstead Act, whose members are

dairy farmers located principally in the states of Wisconsin, Minnesota, Nebraska, South Dakota, Iowa, Kansas, Indiana, Illinois, Oklahoma, Arkansas and Texas. Mid-Am is also a Capper-Volstead qualified agricultural cooperative whose members are dairy farmers located principally in the central portion of the United States.

CMPC is an agricultural marketing cooperative, qualified under the Capper-Volstead Act, whose membership consists of fifteen dairy cooperatives located in Wisconsin and Illinois. CMPC was organized and functions as a common marketing agency—collectively marketing the milk produced by the members of its constituent cooperatives. ARSPC is a qualified Capper-Volstead agricultural cooperative, whose membership consists of dairy cooperatives located principally in the southern and central portions of the United States.[1]

NFO is a not-for-profit farm organization with members located throughout the United States. NFO has collective bargaining programs for a number of agricultural commodities including dairy, livestock, grain, edible beans and potatoes. NFO acts as a collective bargaining agent and bargains for the sale of raw milk produced by its members. NFO's goal has been to gain substantial control of the raw milk production in the United States so that it could set prices. 510 F. Supp. at 505-07; A. 323a-30a.

B. The Decision Of The District Court

This controversy was tried in three phases. This petition relates to Phase II involving NFO's antitrust coun-

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[1] The court of appeals affirmed the trial court's finding that the evidence was insufficient to establish that ARSPC participated in any unlawful conspiracy. 687 F.2d at 1191, 1207; A. 27a, 59a.

terclaims against Mid-Am, AMPI, CMPC and ARSPC and Phase III, which involved AMPI's antitrust and unfair practices counterclaim against NFO.[2] The trial, consisting of 75 live witnesses, excerpts from over 100 depositions, 4,800 exhibits, and over 15,000 pages of trial transcript, spanned a period of two years.

The trial court made extensive factual findings and concluded that NFO had failed to prove: (1) a relevant product and geographic market in which to assess the market power of the defendants under §§ 1 and 2 of the Sherman Act; (2) an actionable conspiracy in violation of §§ 1 or 2 of the Sherman Act; (3) actual or attempted monopolization in violation of § 2 of the Sherman Act; and (4) the institution of "bad faith" litigation by any of the defendants. 510 F. Supp. at 502-03; A. 318a-20a. NFO's antitrust claims were dismissed.

The trial court also dismissed AMPI's antitrust and unfair business practice claims against NFO.

C. The Decision Of The Court Of Appeals

The Eighth Circuit affirmed the trial court's dismissal of AMPI's claims against NFO. Although holding that a prima facie case of a *per se* price fixing violation had been established against NFO, the court, recognizing that the question was a "close one," also held that NFO's Sherman Act violation was exempt under the Capper-Volstead Act despite its recruiting and maintaining non-farmers as members. 687 F.2d at 1186-87; A. 16a-18a.

The court of appeals affirmed the trial court's findings that NFO had failed to establish that the defendants had monopoly power or a dangerous probability of acquiring

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[2] Phase I involved Mid-Am's antitrust and unfair competition claims against NFO.

such power within a properly defined relevant geographic market.[3] Specifically, the appellate court agreed that NFO's ephemeral and inconsistent relevant geographic market definitions, along with its inadequate market share data, could not sustain actual or attempted monopolization claims. *Id.* at 1192; A. 29a. Thus, the court affirmed the dismissal of the claims of monopolization and attempted monopolization under § 2 of the Sherman Act.

The Eighth Circuit reversed the trial court's findings that NFO had failed to establish that AMPI, Mid-Am and CMPC had conspired to monopolize trade in violation of § 2 of the Sherman Act. The appellate court held that proof of "relevant market is not a necessary element" of a § 2 conspiracy claim "because actual attainment or 'dangerous probability' of monopoly power are not at issue." *Id.* at 1193; A. 30a. The court construed § 2 to require merely "a minimal showing . . . as to the product and geographic context of the alleged conspiracy." *Id.* Although the appellate court held that such a showing was inadequate to establish a properly defined relevant market for a § 2 actual or attempted monopolization claim, it concluded that the same flawed proof was sufficient to establish the "product and geographic context"—its newly articulated construct—for a § 2 conspiracy to monopolize claim. After eliminating the relevant market determination as an element of a § 2 conspiracy claim, the court automatically transformed this finding into a § 1 "rule of reason" violation. *Id.*

Confronted with the trial court's findings that NFO had failed to prove a conspiracy in violation of either §§ 1 or 2,

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[3] The court disagreed with the trial court, however, and found that raw Grade A milk was the relevant product market. 687 F.2d at 1191; A. 27a.

the court of appeals undertook an extensive *de novo* factual review noting that the areas of dispute focused on the "inference of intent and conspiracy." *Id.* at 1193; A. 31a. However, of critical significance is the legal issue raised by the court's reliance on exempt joint conduct as the linchpin of its conclusion that there was an unlawful "conspiracy." This protected conduct consisted of: (1) joint marketing arrangements between AMPI and Mid-Am, and CMPC's operation as a common marketing agency—activities protected by the Capper-Volstead Act, *id.* at 1182-83, 1194; A. 8a-9a, 32a; and (2) joint efforts to petition federal and state governments concerning NFO's qualification as a cooperative, *id.* at 1194-96; A. 34a-36a; litigation initiated unilaterally by AMPI and Mid-Am against NFO involving bona fide membership disputes as well as threats of litigation flowing from these disputes, *id.* at 1200-1203; A. 44a-51a—activities protected by the *Noerr-Pennington* doctrine.

In direct conflict with the trial court, the appellate court drew adverse inferences of predatory intent, weighed conflicting testimony, and determined the credibility of witnesses to find a sinister purpose in three instances where actual or potential buyers were alleged to have been unilaterally coerced into refusing to buy milk under NFO auspices, *id.* at 1196-99, 1203-04; A. 38a-44a, 51a-53a—even though these actions were explained by sound business reasons. Furthermore, the trial court never reached certain defenses since it found that NFO failed to prove essential elements of its claims. After finding a violation, the court of appeals reviewed *ab initio*, and rejected, these defenses without the benefit of any findings by the trial court. 510 F. Supp. at 435; A. 174a-75a.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Dispensing With Proof Of Relevant Market In Sherman Act Conspiracy Claims Is In Direct Conflict With Three Other Circuits, Ignores The Plain Meaning Of § 2 And Is At Odds With This Court's Interpretation Of § 1.

This case presents a question of major significance in the proper interpretation of § 2 of the Sherman Act. Logic and the plain language of the Act compel the conclusion that proof of a properly defined relevant market is an essential element of a conspiracy to monopolize claim under § 2. Although this Court has considered and held that proof of relevant market is essential in § 2 monopolization and attempt to monopolize claims and in § 1 "rule of reason" cases, this Court has never squarely decided the important question of the need to prove relevant market in § 2 conspiracy to monopolize claims.

Several circuits have misconstrued *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), as dispensing with proof of relevant market in § 2 conspiracy to monopolize cases. In fact, the analysis at issue only involved the amount of interstate commerce necessary to support jurisdiction. Recently, this Court in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 51 U.S.L.W. 4129, 4144 (February 22, 1983), noted: "our prior cases have emphasized the central interest [of the Sherman Act] in protecting the economic freedom of participants in the relevant market." The misreading of *Yellow Cab* by several circuits undermines that "central interest" of the Sherman Act, and permits the transformation of simple business torts into § 2 violations, complete with the extraordinary remedies of treble damages and attorneys' fees.

The error is compounded by the Eighth Circuit's automatic finding of a § 1 violation based on its § 2 holding.

This Court, and virtually every circuit, require proof of relevant market in § 1 "rule of reason" claims. The Eighth Circuit's decision fosters and encourages civil litigants to continue attempts to expand the reach of §§ 1 and 2 to encompass business torts. Review should be granted to assure the proper and consistent application of the important competition policy embodied in the Sherman Act and to provide sound antitrust analysis as guidance for the business community.

A. Logic And The Clear Statutory Language Require Relevant Market Proof For All § 2 Violations.

The plain language of the Sherman Act compels the conclusion that a plaintiff must show a relevant market in *all* § 2 claims. Section 2 declares that it is unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce . . . ." 15 U.S.C. § 2. The statute is clear—it does not distinguish "conspiracy" from the other violations. The consistent thread, the verb to "monopolize," is the root of the relevant market element.[4] As pointed out in the *Report of the Attorney General's National Committee To Study the Antitrust Laws* at 47 (1955):

> It is sometimes suggested that the words "any part" of trade or commerce in Section 2 refer

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[4] There can be no question that Congress intended the verb to have its dictionary meaning:

> MR. EDMUNDS. I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever ability we had, and the best answer I can make to both of my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize':
>
> 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.
>
> 21 Cong. Rec. 3152 (1890).

> merely to an amount of business sufficient in volume to overcome the objection *de minimis non curat lex*. But the concept of "the market" is not brought into the antitrust laws by the words "any part" in Section 2; rather it is integral to the basic concept of "monopolization," and the ideas of competition and monopoly on which it rests.

Thus, the concept of relevant market embodied in the term "monopolize" modifies all three provisions of § 2—monopolize, attempt to monopolize *and* conspiracy to monopolize. It is illogical to eliminate the need for market definition for but one of these three parallel provisions.

In *United States* v. *Yellow Cab*, 332 U.S. 218 (1947), this Court interpreted "any part" to mean an "appreciable part" of commerce. But the issue in *Yellow Cab* was whether a sufficient amount of commerce was affected to sustain jurisdiction. 332 U.S. at 225-26. The Eighth Circuit, following the lead of several others which misconstrued *Yellow Cab* as rejecting relevant market definition in a conspiracy to monopolize claim, held it sufficient if an "appreciable" amount of commerce is the subject of the § 2 conspiracy. *See, e.g.*, *Salco Corp.* v. *General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975); *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961); *United States* v. *National City Lines*, 186 F.2d 562, 567-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

The logic of interpreting the "any part of the trade or commerce" language as obviating the need for relevant market definition in § 2 conspiracy claims, would compel the same conclusion for actual or attempted monopolization claims. Comment, *The Relevant Market Concept in Conspiracy to Monopolize Cases Under Section 2 of The Sherman Act*, 44 U. Chi. L. Rev. 805, 809 (1977). How-

ever, proof of the relevant market is required in both actual monopolization[5] and attempt to monopolize cases.[6]

B. The Eighth Circuit's Undefined Rule Ignores Economic Reality And Produces Anomalous Results.

The Eighth Circuit has substituted a wholly subjective and undefined rule which ignores the market analysis essential to ascertain the economic and competitive significance of the challenged conduct. By dispensing with the need to prove relevant market, the court ignored

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[5] *See, e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[6] *See Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). Virtually every circuit except the Ninth has followed this Court in requiring proof of relevant market in attempt to monopolize cases. *See, e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *White Bag Co.* v. *International Paper Co.*, 579 F.2d 1384 (4th Cir. 1974); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *United States* v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F.2d 269, 284-86 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Pacific Eng'g & Prod. Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

The Ninth Circuit has been inconsistent on this issue. *Compare Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), *with Cornwell Quality Tools Co.* v. *C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), *and Bushie* v. *Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972). Recent Ninth Circuit cases have held that proof of relevant market is required in those attempt cases where the plaintiff has not proven a substantial restraint of trade or predatory conduct (impact upon a competitor being insufficient to satisfy the latter). *M.A.P. Oil Co., Inc.* v. *Texaco Inc.*, 691 F.2d 1303, 1308-09 (9th Cir. 1982).

substantial economic market factors: (1) the unique market structure and characteristics of the dairy industry in contrast to traditional industrial settings;[7] and (2) the area of effective competition between NFO and AMPI and the other cooperatives.[8]

Acknowledging that it was confronted "with uncertainty as to monopoly power in a properly defined market or submarkets," the Eighth Circuit simply concluded that AMPI, Mid-Am and CMPC were the "major marketers" of milk in the "Midwest." 687 F.2d at 1192; A. 29a. Under the amorphous "product and geographic context" test, that was enough to establish liability. To conclude that an event has taken place in a "product and geographic context" is economically irrelevant. It does not even purport to measure market power. The existence of monopoly

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[7] Unlike industrial concerns, a cooperative's market power is tenuous at best. Dairy farmers often shift among various cooperatives. Moreover, because members control the production at the farm, the cooperative, unlike an industrial concern, cannot control output. Finally, entry into dairy marketing is virtually barrier-free. *See* Capper-Volstead Study Committee, U.S. Department of Agriculture, *Undue Price Enhancement by Agricultural Cooperatives, Final Report* at 7 (June 1980). These unique aspects of dairy cooperatives highlight the importance of more extensive market analysis to determine whether there was any likelihood that monopoly power could have existed or been achieved.

[8] Even the Eighth Circuit refused to accept NFO's artificially drawn "markets" as meeting the well-established test of relevant market—the "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). NFO offered no expert testimony to support its proffered geographic market definitions. The uncontroverted expert testimony at trial rejected the NFO-proffered "markets" as not being economically significant for measuring market power (Tr. 14383-4, 14487-91). One of NFO's principal witnesses conceded that NFO, and the dairy industry as a whole, viewed the entire United States as one market. (Tr. 5202-06).

power—the power to raise prices above competitive levels by restricting output—cannot be determined without economic market analysis. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra*, at 4145 n.40 (noting the deficiencies in failing to allege, in a Sherman Act case, "that output has been curtailed or prices enhanced throughout an entire competitive market"); *United States* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41, 197 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956). The anomolous result of the Eighth Circuit's decision is a finding of conspiracy to monopolize where both the appellate court and the trial court had unequivocally concluded that the record evidence was insufficient to measure market power in a relevant geographic market.[9]

The failure of the Eighth Circuit to come to grips with the economic realities was based on its erroneous reasoning that relevant market is immaterial because the "actual attainment or 'dangerous probability' of monopoly power is not at issue in a conspiracy claim." 687 F.2d at 1182; A. 8a. This rationale misses the mark in view of the plain language of § 2. As the Eighth Circuit conceded, defendants could not be guilty of actual or attempted monopolization because no relevant market was proven. If the object or purpose of defendants' "conspiracy" can-

[9] Although it affirmed the trial court's findings that the Federal Milk Marketing Orders proffered by NFO were not relevant geographic markets, the court of appeals noted the amount of Grade A milk pooled on some of these orders by aggregating the shares of AMPI, Mid-Am and CMPC. Neither the aggregation nor what it represented—milk pooled on Federal Orders—had any significance in showing market power. 687 F.2d at 1192; A. 28a-29a.

not be deemed a monopoly, then that "conspiracy" cannot be deemed a conspiracy "to monopolize."[10]

C. The Eighth Circuit's Holding Is In Direct Conflict With Three Other Circuits.

Several circuits have correctly held that relevant market proof *is* necessary to establish the § 2 offense of conspiracy to monopolize, some of them holding that the relevant market concept is included in the element of specific intent to monopolize. *See Bill Beasley Farms, Inc.* v. *Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983); *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *American Football League* v. *National Football League*, 323 F.2d 124, 132 n.18 (4th Cir. 1963). A specific intent to monopolize would have no economic significance unless it was a specific intent to obtain the substantial power requisite to control prices by reducing output.

The Eighth Circuit's rejection of this rationale does not withstand scrutiny and directly conflicts with the decisions in the Fourth, Fifth and Eleventh Circuits. The Eighth Circuit's decision also conflicts in principle with the Third and District of Columbia Circuits, which have analyzed § 2 conspiracy claims within the relevant market framework. *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139, 153-54 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

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[10] Since the objective proscribed by § 2, as stated by this Court, is the acquisition of "the power to control prices or exclude competition," the intent to achieve a competitive position that does not confer such power cannot be unlawful. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

The Eighth Circuit relied, in part, upon *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 n.23 (1956), to support its conclusion that relevant market proof is not required for § 2 conspiracy claims as opposed to actual and attempt claims. 687 F.2d at 1181-82; A. 8a. The court's reliance upon the *duPont* footnote is misplaced; neither *duPont* nor the cases cited in the *duPont* footnote supports such a conclusion.[11]

The Eighth Circuit also relied upon *United States* v. *Consolidated Laundries, supra*, to support its conclusion that relevant market proof is not necessary in a conspiracy to monopolize claim. 687 F.2d at 1182; A. 8a. *Consolidated Laundries* embraced the erroneous "appreciable amount of commerce" test. It is an example of the untoward results that can follow from failing to require proof of the relevant market in § 2 conspiracy claims.[12] Moreover, the rationale of *Consolidated Laundries* has not been embraced within its own circuit.[13]

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[11] The *duPont* footnote cites *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), but recognizes that the "scope of the market was not in issue" in that case. *duPont* also cites *Indiana Farmer's Guide Publ. Co.* v. *Prairie Farmer Publ. Co.*, 293 U.S. 268 (1934), an attempt to monopolize case, in which this Court specifically recognized that the provisions of § 2 have a distributive and geographic significance. 293 U.S. at 278-279. This Court recognized the geographic significance of the relevant market in *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), a § 1 Sherman Act case also cited in the *duPont* footnote, in language referring to the Sherman Act generally. 334 U.S. at 519.

[12] The conspiracy at issue achieved control of about 1% of an industry composed of numerous small competing concerns. The Second Circuit held that this miniscule market share was not pertinent since "relevant market" is not an essential element of a § 2 conspiracy. 291 F.2d at 572-73.

[13] *Consolidated Laundries* was ignored in *Karlinsky* v. *New York Racing Ass'n, Inc.*, 517 F.2d 1010, 1012 (2d Cir. 1975), which required proof of relevant market as an essential element of a § 2 conspiracy to monopolize case.

D. The Eighth Circuit's "Automatic" § 1 Holding Compounds The Error.

The court's error is magnified by its finding of an automatic § 1 violation based on its § 2 finding which did not require proof of a relevant market. By dispensing with relevant market proof, a prerequisite for measuring any injury to competition in a § 1 "rule of reason" case, *Times-Picayune Publ. Co.* v. *United States*, 345 U.S. 594, 615 (1953), the Eighth Circuit adopted a rule that runs counter to the precedent in this Court and virtually every other circuit, including its own.[14] The effect of the court's holding is to emasculate both §§ 1 and 2 by rejecting the market analysis which is at the heart of the Sherman Act's prohibitions.

The court's decision is replete with inferences of intent to block or hamper NFO. 687 F.2d at 1193; A. 31a. Without any meaningful economic analysis such inferentially unfair or unethical conduct was deemed violative of §§ 1 and 2. Expanding §§ 1 and 2 to encompass improper business conduct undermines the competition policy embodied in the Sherman Act. Preoccupied with the perceived effect upon one competitor, and unrestrained by meaningful economic analysis, the court's perception of unfair conduct was transformed into a violation of § 2, and

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[14] *See, e.g., Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979); *U.S. Trotting Ass'n* v. *Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 790 (7th Cir. 1981); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *See also T.V. Signal Co. of Aberdeen* v. *American Telephone and Telegraph*, 617 F.2d 1302, 1309 n.8 (8th Cir. 1980); *Stifel, Nicolaus & Co.* v. *Dain, Kalman & Quail, Inc.*, 578 F.2d 1256, 1261 n.6 (8th Cir. 1978).

then an automatic violation of § 1.[15] By ignoring the economic impact upon "competition," the court resurrected such long-discredited, aberrational holdings as *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932), that transformed business torts into antitrust violations. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 560-61 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

If the decision below is permitted to stand, procompetitive conduct or robust competition, albeit injurious or detrimental to a competitor, will carry the risk of an antitrust treble damage suit. There is *no* necessity to expand the reach of the antitrust laws to encompass business torts for which there are already a number of remedies under state unfair competition and tort laws, and the Federal Trade Commission Act.

II. The Eighth Circuit's Reliance Upon Exempt Joint Conduct As Its Sole Predicate For Finding An Unlawful Conspiracy Emasculates The Capper-Volstead Act And *Noerr-Pennington* Antitrust Exemptions.

This case presents an important question of legislative and constitutional dimensions. The Eighth Circuit's reliance upon exempt joint conduct abrogates the Capper-Volstead Act and *Noerr-Pennington* antitrust exemptions and conflicts with this Court's holding in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965). The right of agricultural cooperatives to engage in joint

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[15] An intent to injure a competitor is insufficient to establish a specific intent to monopolize under § 2. *Bill Beasley Farms, Inc.* v. *Hubbard Farms, supra.* Nor can such an intent satisfy the "rule of reason" analysis required under § 1. *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

marketing activities and the right to petition the government and to resort to the courts have been relegated to empty vessels.

The touchstones of the Eighth Circuit's findings of an unlawful conspiracy were: (1) joint marketing agreements and arrangements among the cooperative defendants which the court held exempt under the Capper-Volstead Act;[16] and (2) joint efforts to petition the federal and state governments, and litigation initiated by defendants over membership disputes with NFO, which the court held were exempt under the *Noerr-Pennington* doctrine.[17] 687 F.2d at 1194-96, 1200-03; A. 34a-36a, 44a-51a. The other activities noted by the court were unilateral and non-concerted acts by each defendant. *Id.* at 1196-99, 1203-04; A. 38a-44a, 51a-53a. Missing is any non-exempt joint or concerted conduct which could support an inference of the existence of an unlawful conspiracy.

The appellate court's finding that a conspiracy existed was premised on viewing "specific overt acts of the defendants . . . in light of their concerted marketing practices as a whole." *Id.* at 1194; A. 32a. The referenced

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[16] It has been clearly established that independent cooperatives can join together and collectively market the products of their producers. Such joint marketing arrangements have been recognized as exempt from the antitrust laws. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 370 U.S. 19 (1962); *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203, 212-14 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). The clear language of § 6 of the Clayton Act, read in conjunction with § 1 of the Capper-Volstead Act, makes inescapable the conclusion that such joint arrangements cannot be "construed to be illegal combinations or conspiracies in restraint of trade . . ."

[17] Without question, joint or concerted efforts to induce favorable judicial, legislative or administrative action detrimental to competitors, even if the sole purpose is to destroy competition, are exempt

"concerted marketing practices" were: (1) joint marketing agreements between AMPI and Mid-Am; (2) membership of each in the other cooperative; (3) membership of AMPI in CMPC—a federation of dairy cooperatives; and (4) AMPI's functioning as the marketing agent of CMPC. *Id.* Despite its previous recognition that these joint marketing activities were immune under the Capper-Volstead Act, the appellate court nonetheless relied upon them to find the existence of an unlawful conspiracy. *Id.* at 1182-83; A. 8a-9a.

The court of appeals held that governmental contacts by Mid-Am, AMPI and CMPC, aimed at blocking NFO's qualification as a cooperative, were exempt under the *Noerr-Pennington* doctrine. *Id.* at 1195; A. 34a-35a. The court recognized that the dispute over NFO's qualification was genuine due to the nature of NFO's structure and operations, *id.*; A. 35a, and it concluded that these various governmental contacts were not actionable. However, the court held that, "[w]hile not illegal because of the exemption, this conduct does have evidentiary value as to the purpose *and concerted character* of these co-ops' contemporaneous nonexempt activities." *Id.* at 1196; A. 36a. (Emphasis added). The court used these governmental contacts and an exempt meeting[18] as the

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under the *Noerr-Pennington* doctrine. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961).

[18] The court relied, in part, on what it characterized as several meetings held in 1970 to infer the existence of an unlawful conspiracy. 687 F.2d at 1194-95; A. 33a-34a. In fact, as the trial court's findings, relied upon by the appellate court disclose, there was only one meeting which was attended by representatives of Mid-Am and AMPI as well as their counsel. 510 F. Supp. 458, 469, 480-81; A. 222a-223a, 246a, 270a-271a. The court employed this meeting to support the

predicate for its inference of the existence of an unlawful conspiracy.

The Eighth Circuit's reliance on exempt joint conduct as the basis for finding an unlawful conspiracy stems from its erroneous understanding of the suggestion by this Court in *United Mine Workers* v. *Pennington*, *supra*, at 670 n.3, that exempt conduct may be admissible, if not unduly prejudicial, "to show the purpose and character of the particular transactions under scrutiny." The court of appeals transformed this rule of limited admissibility into the substantive proposition that exempt joint conduct can be used to infer the actual existence of an unlawful conspiracy. 687 F.2d at 1196; A. 36a.

The *Noerr-Pennington* doctrine, rooted in the First Amendment rights to associational freedom and to petition government, including the courts, *California Motor Transport Co.* v. *Trucking Unlimited*, *supra*, at 510, has been substantially eroded by the Eighth Circuit's decision. Indeed, that decision directly conflicts with *United Mine Workers* v. *Pennington*, *supra*, at 670, where this Court held that a jury instruction had failed to take proper account of the exemption:

> If therefore, the jury determined the requisite anticompetitive purpose to be present, it was free to find [under the challenged instructions]

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conclusion of the existence of an unlawful conspiracy, 687 F.2d at 1194-95; A. 33a-34a, although the cooperative representatives discussed publicizing via radio or television NFO's cut-rate marketing tactics, NFO's solicitation of cooperative members and NFO's qualification as a cooperative. The decision made at that meeting was to seek the opinions of the attorneys general of Missouri, Wisconsin and Minnesota concerning NFO's qualification as a cooperative. NFO Ex. 46. There simply is no evidence that the representatives at that meeting agreed or otherwise had any understanding to pursue an illegal course of conduct.

> an illegal conspiracy based solely on the Walsh-Healey and TVA episodes [the exempt conduct], or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however, is permitted by *Noerr* for the reasons stated in that case.

The court of appeals acknowledged a portion of this Court's *Pennington* holding that such conduct is "not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 687 F.2d at 1195; A. 35a. However, the appellate court misinterpreted the crux of the holding which precludes predicating a finding of an unlawful conspiracy *solely or in part* upon exempt conduct.

The decision below highlights the confusion which has resulted from the misinterpretation of the "purpose and character" footnote dictum in *Pennington, supra. See* 6 von Kalinowski, *Antitrust Laws and Trade Regulation*, § 46.04[2] n.23 (1982).[19] In no other case, however, has antitrust liability been so directly predicated upon participation in constitutionally and legislatively protected concerted activities.[20] The Eighth Circuit's reliance on such

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[19] A number of courts, sensitive to the important policy considerations inherent in the *Noerr-Pennington* doctrine, have been reluctant to use evidence of participation in exempt conduct to infer predatory intent or to show an illegal scheme. *See, e.g., Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *see also* Fischel, *Antitrust Liability For Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 121 (1977).

[20] Neither case cited by the Eighth Circuit supports its analysis. In *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), the Fifth Circuit refused even to admit evidence of participation in protected activities

conduct does not square with this Court's holding in *Pennington*.

The appellate court's misunderstanding of the scope of the *Noerr-Pennington* exemption is also evidenced by the distinction it drew between litigation directed at a competitor and litigation, or threats of litigation, aimed at a customer or potential customer of a competitor. 687 F.2d at 1201-02; A. 45a. The court found that there were genuine disputes between AMPI and NFO, and Mid-Am and NFO, concerning NFO's unlawful solicitation and raiding of their respective members. *Id.* at 1200; A. 45a-46a. Although subsumed in the main *Noerr-Pennington* legal issue raised by petitioner, the Eighth Circuit's erroneous rule of law limiting the *Noerr-Pennington* protection to litigation against competitors presents an important legal issue. Indeed, the court of appeals' limitation eviscerates the basic policy considerations enunciated in the *Noerr-Pennington* line of cases.

The court held that the litigation engaged in unilaterally by Mid-Am and AMPI against NFO was exempt by the *Noerr-Pennington* doctrine. *Id.* However, the court held that litigation and threatened litigation flowing from these same membership disputes against NFO's actual or potential customers constituted "bad faith, unlawful harassment." This conclusion was based on its erroneous view that such conduct directed at customers of a com-

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to show either the defendants' motivation or the character of other nonprotected activities. Admission of such evidence would be "improper," the court held, because its evidentiary value was "far outweighed by the defendants' first amendment interests." 586 F.2d at 543 n.7. In *Webb* v. *Utah Tour Brokers Ass'n.*, 568 F.2d 670 (10th Cir. 1977), there was ample evidence, other than exempt conduct, of concerted boycott activities. *Id.* at 674-675. To the extent that either case suggests support for the appellate court's decision here, they are fundamentally at odds with this Court's holding in *Pennington*.

petitor, in contrast to the competitors themselves, is outside the scope of the *Noerr-Pennington* doctrine. *Id.*[21]

The so-called litigation threats represented nothing more than the unilateral assertion of membership rights by the cooperatives and attempts to preserve those rights under state laws. State laws, including the Wisconsin statute under which AMPI sued NFO, permit cooperatives to sue customers who receive or purchase production from cooperative members where the customer has notice that the production is being marketed in violation of the cooperative's marketing agreements. *See, e.g.*, Wis. Stat. Ann. §§ 185.41-43.[22]

There is no sound basis for the Eighth Circuit's competitor-customer distinction in applying the *Noerr-Pennington* exemption. Litigation and threats of litigation based on the same genuine disputes are protected by the exemption whether directed at a competitor or his customers. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 555-56, 558 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). Most recently, the Fifth Circuit in *Coastal States Marketing, Inc.* v. *Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983), flatly rejected the competitor-customer distinction and noted:

> Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does

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[21] The court did not even suggest that either the litigation or the threats of litigation were the result of joint or concerted action of any kind. 687 F.2d at 1200-03; A. 44a-51a.

[22] Buyers of milk from producers in violation of membership agreements are subject to suit under the Wisconsin statute provided they are given notice of the membership rights of the cooperative. *Watertown Milk Producers Coop. Ass'n* v. *Van Camp Packing Co.*, 199 Wis. 379, 388, 225 N.W. 209, 212, *reh. denied*, 199 Wis. 394 226 N.W. 378 (Sup. Ct. 1929). Most states have similar statutes. *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U.S. 71 (1928).

> not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.

The constitutional policies of the *Noerr-Pennington* doctrine do not countenance the limitations on First Amendment freedoms adopted below. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*, at 142-44.[23]

III. The Appellate Court Usurped The Functions Of The Trial Court In Derogation Of Rule 52(a) Of The Federal Rules Of Civil Procedure.

The Eighth Circuit's expansive and erroneous view of the scope of its appellate function warrants review by this Court because it raises an important question of law concerning the proper role of appellate courts. The court's willingness to draw numerous inferences of intent, motive and design—peculiarly issues for the trier of fact—is fundamentally inconsistent with this Court's admonition in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982). The appellate court weighed conflicting testimony, drew inferences and made credibility determinations to reach the conclusion that otherwise lawful conduct was motivated by predatory intent. As we demonstrated, *supra*, at 17-24, the inferences of conspiracy were impermissibly predicated on exempt conduct.

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[23] The case relied on by the Eighth Circuit, *Oahu Gas Serv., Inc.* v. *Pacific Resources, Inc.*, 460 F. Supp. 1359, 1386 (D. Haw. 1978) cannot be squared with this Court's rationale in the *Noerr-Pennington* line of cases, and there is no precedent for the distinction upon which that case rests. *See Coastal States Marketing, Inc.* v. *Hunt*, *supra*, at 1367 n.30.

The Eighth Circuit's inferences of predatory intent were based upon the individual conduct of each cooperative in several instances involving NFO customers or potential customers. These situations shared the same basic earmarks: (1) each involved unilateral conduct of one of the defendants; and (2) the appellate court, after reweighing the evidence and in some instances the credibility of witnesses, chose to infer predatory intent rather than credit the contrary evidence of legitimate business purpose. The trial court—the fact-finder—had refused to draw such inferences in view of what even the appellate court agreed were legitimate business justifications for the acts in question.

Although the trial court did not specifically address the standard of predation that it applied, the appellate court articulated a rule under which legality was "not merely a question of whether it [the conduct] is 'predatory' in a strict sense, *e.g.*, lacking a legitimate business justification." 687 F.2d at 1183; A. 10a. Rather, the court concluded that a cooperative's business practices are "not immunized simply because they might also have other justifications or because they are merely 'anticompetitive' rather than 'predatory.' " *Id.* In short, the court ignored the substantial exculpatory evidence and embarked upon a *de novo* search for inferences of "anticompetitive" intent. The flaw in this approach is manifest: legitimate business purpose or other economic justification negates the existence of predatory intent especially where, as here, the appellate court recognized that it was lawful for cooperatives to pursue monopoly power and eliminate competition among themselves. *Id.* at 1193; A. 31a.

The appellate court drew adverse inferences of predation by refusing to credit the evidence which demonstrated that sound business reasons motivated the cus-

tomers' decisions to avoid purchasing NFO-member milk. Inexplicably, in two of these instances the court inferred predatory intent from conduct which was not even directed at NFO. *Id.* at 1196, 1203; A. 36a-38a, 51a-53a. In the third situation, involving Wanzer Dairy, the appellate court characterized as predatory and discriminatory the pricing program of CMPC, despite the record evidence that the pricing program was economically justified by the higher costs of supplying less regular customers. *Id.* at 1198; A. 42a.[24] The court gave no weight to this economic justification. Even under the appellate court's analysis, the upshot of this so-called discriminatory conduct was that CMPC negotiated a one-year partial supply contract with Wanzer Dairy—hardly the stuff out of which predation can be inferred.

The treatment of the Foremost Dairy situation stands out as a classic example of appellate factfinding. A Foremost official gave ambiguous deposition testimony as to why he was not ready to "take the plunge" and buy NFO-member milk, including a catalogue of reasons for his distrust of NFO. Again, the court of appeals reweighed that testimony and inferred predation. The court inferred predatory intent and coercion despite its recognition that neither Mid-Am nor AMPI had directly threatened Foremost. These inferences were based on the court's perception that: (1) Foremost became aware of Mid-Am's litigation against Beatrice[25] and (2) Foremost feared retaliation from AMPI. *Id.* at 1203-04; A. 51a-52a.

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[24] Eschewing *de novo* review, the court nonetheless drew adverse inferences of predatory intent despite its recognition of the "conflicts in testimony; that some witnesses deny or attempt to explain away what others admit." 687 F.2d at 1199; A. 43a.

[25] Indeed, the court inferred that Foremost's awareness of that litigation had a coercive effect and deterred Foremost from buying NFO milk. *Id.* at 1204; A. 52a-53a. As the court of appeals recognized, missing from this sequence of inferences is any joint or con-

The court's inference of threatened retaliation by AMPI was based on an event which had nothing to do with NFO, which took place quite some time before NFO even approached Foremost. To reach that inference of retaliation, the court rejected the trial court's finding that a one-day short shipment of supplies to Foremost in 1969 was not retaliatory. In order to reject that specific finding of fact the appellate court further inferred that an AMPI employee's testimony, on which the finding was based, lacked credibility. *Id.* at 1203 n.36; A. 51a. In its effort to draw this series of inferences, the court of appeals ignored the direct testimony of the Foremost officer who made the decision, that he refused to purchase NFO milk for "objective reasons," after "[a]n objective evaluation of the situation," and that it "was absolutely not true" that anyone had coerced or told Foremost not to purchase the milk. (Rudy Dep. 432-33). In addition, the court's strained series of inferences of coercion, *id.* at 1204 & n.37; A. 52a-53a, ignored the fact that there was no evidence that AMPI and Mid-Am had acted in concert with respect to Foremost.

The drawing of an adverse credibility inference against AMPI employee Murphy, based on alleged destruction of documents, is a blatant example of *de novo* review. Although the court volunteered that it would have affirmed imposition of "the most severe sanctions," it held that the trial judge's refusal to impose those sanctions was not an abuse of discretion. *Id.* at 1205; A. 55a-56a. That holding makes all the more remarkable its second-guessing of the trial court as to the credibility of Murphy's testimony, in

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certed conduct in the initiation of the litigation by Mid-Am; neither Mid-Am nor AMPI had any discussions with Foremost about that litigation; neither threatened litigation against Foremost; and, more importantly, Foremost learned about the legal problems from direct contact with Beatrice representatives, not from the defendants. *Id.*

order to fashion its sequence of inferences culminating in the conclusion that AMPI coerced Foremost. *See* 510 F. Supp. at 460; A. 226a-227a; *Id.* at 1203 n.36; A. 51a.

The trial judge had heard the evidence, read briefs and presided over depositions on the question of discovery derelictions; had personally examined 56 boxes of documents subpoenaed by a grand jury[26] on the issue and the grand jury testimony of 50 witnesses; had also considered evidence that NFO employees had been ordered to clean out their desks, hide and burn documents before opposing attorneys began document production; and had "[kept] this question in mind throughout the trial . . . ." (Tr. 12214). The trial judge, better than the appellate court, was in a position to determine what sanctions were appropriate. He decided not to draw *any* adverse inferences against AMPI.

The appellate court noted that the focus of this case turned on inferences of intent and conspiracy. 687 F.2d at 1193; A. 31a. Yet, its resolution of these peculiarly factual issues is fundamentally at odds with this Court's interpretation of Rule 52(a). In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982), this Court emphasized that findings of intent, motive and design are "peculiarly factual issues for the trier of fact . . ." *See United States* v. *Yellow Cab*, 338 U.S. 338, 341 (1949) (involving the intent requisite in a conspiracy to monopolize claim under § 2 of the Sherman Act). In

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[26] The grand jury refused to indict AMPI on charges that the alleged discovery dereliction constituted obstruction of justice. Several compelling factors precluded indictment as well as the imposition of sanctions by the trial court: (1) the documents in question were destroyed before AMPI was sued by NFO; (2) it was an isolated event and the documents did not relate to NFO or any other competitor; and (3) certain other categories of allegedly withheld documents were produced to NFO well before the close of discovery.

United States v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-96 (1950), the Government sought to reverse a finding that no conspiracy existed. This Court refused to substitute its view of the facts for that of the district judge:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . . We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." [citations omitted].

Unlike this Court's interpretation of Rule 52(a), the court of appeals here gave the facts relating to the issues of intent and conspiracy another construction, resolved the ambiguities differently and found a sinister cast to actions deemed innocent by the trial court.[27] The extent to which the appellate court usurped the functions of the trier of fact is manifest in its opinion.

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[27] The extent to which the Eighth Circuit departed from the traditional function of a federal appellate court is highlighted by its gratuitous reference to alleged unlawful contributions to former President Nixon's Reelection Committee. 687 F.2d at 1195 n.19; A. 35a-36a. As the court conceded, even *NFO did not urge* either at trial or on appeal that this alleged conduct bore any relationship to the case. However, the court felt compelled to note its existence, simultaneously disclaiming that it had any bearing on this case. *Id.* This reference to political contributions clearly suggests that it played a role in the court's determination of this case, despite the disclaimer. The unsolicited character of the reference by the court, albeit in a footnote, indicates that it was a factor in the court's decision. It clearly should not have been a factor, worthy of any comment, in this civil treble damage antitrust action.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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